United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2158

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
JOEL SMITH, a/k/a CHARLES SMITH,

Petitioner-Appellee,

-against-

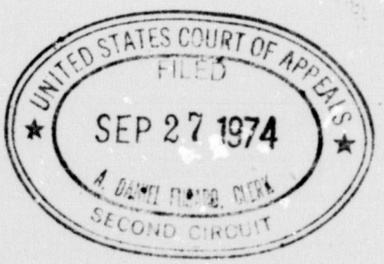
ERNEST L. MONTANYE,
Superintendent,
Attica Correctional Facility,

Respondent-Appellant.

Docket No. 74-2158

BRIEF FOR PETITIONER-APPELLEE
JOEL SMITH

ON APPEAL FROM AN ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. JOEL SMITH, a/k/a CHARLES SMITH, Petitioner-Appellee, -against- ERNEST L. MONTANYE, Superintendent, Attica Correctional Facility, Respondent-Appellant.	Docket No. 74-2158

BRIEF FOR PETITIONER-APPELLEE JOEL SMITH

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether petitioner has exhausted his state remedies.

2. Whether the introduction into evidence of the co-defendant Leroy Sprinkler's statements implicating petitioner was harmless error.

3. Whether the charge to the jury was so erroneous and prejudicial as to deny petitioner due process of law.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal taken by the State of New York from an order of the United States District Court for the Eastern District of New York (The Honorable John F. Dooling, Jr.) dated August 15, 1974, granting petitioner's motion for the issuance of a writ of habeas corpus.

This Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. Prior Proceedings

Petitioner was convicted of manslaughter in the first degree on October 28, 1959, in the former New York County Court, Kings County (Marasco, J.). He was sentenced to imprisonment for a term of ten to twenty years.

Petitioner failed to take an appeal, but in 1969 this Court (United States ex rel. Smith v. McMann, 417 F.2d 648 (2d Cir. 1969)), found that petitioner had been denied his right to be informed by his court-appointed counsel of his right to appeal without expense and that this Constitutional violation required release unless his appeal was re-

instated. More than two years later, on January 16, 1972, petitioner's sentence was vacated in state court, and he was re-sentenced nunc pro tunc so that he might file a timely notice of appeal.

Petitioner then pursued his state appellate remedies. On November 20, 1972, the Appellate Division, Second Judicial Department, affirmed his conviction without opinion (40 N.Y.S. 2d 953). Leave to appeal to the Court of Appeals was denied.

B. The Trial

Petitioner, along with Leroy Sprinkler, Fred Sprinkler,* and Allen LaFrank;** was charged with the killing of one Jesse Cross at approximately 10:00 p.m. on March 9, 1959, at a small playground in the Albany Housing Project in the Bedford-Stuyvesant section of Brooklyn. The indictment charged both manslaughter in the first degree (former Penal Code §1050) and assault in the second degree (former Penal Code §242).

At trial, the State sought to prove that petitioner and the three others, all teen-age boys at the time of the incident, killed Cross during an argument following hours of

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*Fred and Leroy Sprinkler, who are brothers, will be referred to by their full names.

**Fred Sprinkler and LaFrank pleaded guilty prior to trial. Both testified at trial, and Leroy Sprinkler and petitioner were convicted of manslaughter in the first degree. Leroy Sprinkler's conviction was later reversed by the Appellate Division, Second Deparment (221 N.Y.S. 149 (1961)), on the ground of insufficiency of the evidence.

drinking together. The principal state witnesses were boys who participated in the drinking and were present during the incident -- Daniel Paccilli, Fred Sprinkler, Allen LaFrank, and Arthur Burrows.

The four boys gave confusing, somewhat incoherent, and sometimes contradictory accounts of the killing. Their testimony, however, reveals the following essential facts: On the day in question, the various boys involved, including Cross, spent the afternoon and evening hours drinking heavily (Paccilli, 55-63,* F.Sprinkler, 103-05; LaFrank, 123-27; Burrows, 165-70). At about 10:00 p.m. Cross and Fred Sprinkler got into an altercation. A scuffle among several of the boys and Cross ensued, during which petitioner began moving toward Cross with a knife. Fred Sprinkler, however, stopped petitioner from reaching Cross, took the knife (which had been removed from petitioner's hand by LaFrank), and stabbed Cross four times (Paccilli, 56-63; F.Sprinkler, 81, 93; LaFrank, 123; Burrows, 165-66). All the witnesses agreed that petitioner never got closer than seven to ten feet to Cross, and that only Fred Sprinkler was seen stabbing Cross. In fact, Burrows stated that after LaFrank took the knife from petitioner, petitioner turned away from the fray and vomited from the excessive drinking (Paccilli, 59; F.Sprinkler, 98-99; LaFrank, 124; Burrows, 167-70).

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*Numerals in parentheses refer to pages of the transcript of the trial.

The State then sought to adduce evidence that, although petitioner had not stabbed Cross during the fight, he did so later. The State attempted to prove this by hearsay evidence that petitioner had confided this fact to others. Fred Sprinkler related that shortly after the incidents at the playground he met petitioner on a street corner and petitioner claimed to have stabbed Cross twice after most of the boys had left the playground (82).* Thomas Abrams, a friend of Fred Sprinkler's who was not at the playground that night, claimed to have overheard petitioner's admission** (32-36).

Two other items of hearsay evidence, the admissibility of which is raised here, were statements given by Leroy Sprinkler. One was a stenographically recorded confession made on the day following the killing and read to the jury by the Assistant District Attorney. Realizing that the confession implicated petitioner and that Leroy Sprinkler would not testify and be subject to cross-examination, the judge ordered the confession redacted of all references to petitioner. The Assistant District Attorney, however, when reading the redacted

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*Fred Sprinkler, who admitted stabbing Cross four times, testified that he pleaded guilty to the indictment, but was promised that he would be permitted to change his plea to guilty to manslaughter in the second degree, unarmed, if he testified "truthfully" at trial.

**Abrams also revealed that, although he was interviewed by the police following the killing, he never mentioned overhearing petitioner's street corner statement until he talked to the Assistant District Attorney the day prior to trial (46-47).

confession to the jury, included sufficient statements so that the jury, when considering the confession with the earlier testimony of Fred Sprinkler and Adams, could conclude that petitioner had admitted to Leroy Sprinkler that he had stabbed Cross:

> Q When you were on Ralph Avenue, then did Joel Smith come up to you?
>
> A Yes.
>
> Q Who was with you on Ralph Avenue?
>
> A My brother and Thomas Abrams and a few more guys.
>
> [Redaction].
>
> Q What else did he say?
>
> A That's all I recall. I wasn't listening that close.
>
> (163).

There was also testimony by Detective Richard Burnes that on the day following the killing Leroy Sprinkler made a statement to him which, according to Burnes, included the following:

> THE WITNESS: I asked him, "Did Joel Smith have anything to say about the stabbing [when you met him later]?" He said, "Yes, Joel came along and told Abrams, while I was standing there, that my brother did a guy over, but that he was not dead, and I did him over a couple of more times and he is dead now."
>
> I asked him who heard that. He said he was talking to Abrams,

and Abrams heard it, and my brother heard it, and I heard it.

(196).

Also testifying for the State were Dr. George Ruger, whose autopsy revealed that eight of fourteen stab wounds received by Cross could have caused death, but that it could not be determined which wound daused death or when Cross died (69-75), and Detective Elias Reiter, who related that on the day after the killing petitioner led him to the hidden knife (177).

The evidence against petitioner was that he participated in the original affray but did not touch Cross and that he claimed to have stabbed Cross after the others left the playground. The jury instructions given by Judge Marasco, however, failed to instruct adequately on which acts of petitioner, if believed by the jury, would constitute manslaughter, assault, or aiding and abetting. The charge also failed to advise the jurors that petitioner could be found guilty of the lesser included offense of manslaughter in the second degree. The judge also failed to instruct as to the defense of intoxication, pursuant to former Penal Law §1220, required because the State's theory of guilt was that petitioner was an aider and abetter in the affray which led inadvertently to Cross's death.*

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*Since intent is not an element of manslaughter in the first degree when one acts as a sole acting principal, the defense of intoxication (i.e., negation of intent) is not available. But since aiding and abetting a scheme resulting in a manslaughter killing does require intent to be part of the scheme, intoxication, and the lesser degree of the predicate crime, must be charged. See Argument, Point III, infra.

Also absent was an instruction as to whether petitioner's participation in the brawl could legally be deemed assault, and not manslaughter, if the jury decided that only Fred Sprinkler, who admitted being the first to stab Cross, was guilty of manslaughter. Moreover, the judge failed to instruct the jurors how they could evaluate petitioner's guilt or innocence if they decided that petitioner's later stabbing had in fact occurred but had not caused or accelerated Cross's death.

Also erroneous as violative of petitioner's privilege against self-incrimination was the instruction on the failure of petitioner to testify:

> The defendants did not testify in this case. I charge you now that a person or persons accused of crime may or may not refuse to testify in their own behalf, and their failure to do so raises no presumption against them; in other words, the mere fact that the defendants did not testify, raises no unfavorable impression against them.
>
> The defendants have not taken the stand and you will consider then the case on the basis of the testimony you have heard.
>
> (305).

No objection was made to the jury instructions by petitioner's counsel. After deliberation, the jury found petitioner guilty of manslaughter in the first degree.

C. The Present Case

In his petition to the District Court petitioner urged that the use of co-defendant Leroy Sprinkler's confessions was unconstitutional and that the judge's instructions to the jury were so defective on what the jury had to find in order to convict petitioner as to deprive him of a fair trial.

Judge Dooling sustained both of these constitutional arguments, but found that neither had been properly presented on appeal to the Appellate Division. Accordingly, he refrained from granting the writ until petitioner could seek review of these issues in the state courts (Memorandum and Order, April 9, 1974, at 20, 22).

Petitioner sought review of these issues in the Appellate Division, Second Department, in the form of a motion for re-argument of his former appeal.* That court, on July 2, 1974, accepted petitioner's pro se re-argument petition, and reaffirmed its earlier (337 N.Y.S.2d 498 (November 13, 1972)) judgment:

> With due respect to any view which the United States District Court may have, this court has considered all the issues on this motion and the predicate appeal. We adhere

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*Lacking assistance of counsel, petitioner originally filed for relief in Supreme Court under N.Y.Crim.Pro.Law §440.10, but withdrew his §440.10 petition in favor of a rehearing petition in the Appellate Division. Petitioner's ultimate choice of forum was proper. See Argument, Point I, infra.

> to our position after reconsideration and trust that the Federal court will likewise respect the autonomous jurisdiction of this court over the subject matter of the appeal.
>
> Order of the Appellate Division, Second Judicial Department, July 2, 1974.

Thereafter, on August 15, 1974, Judge Dooling, based on his decision of April 9, 1974, granted the writ of habeas corpus sought by petitioner. In his opinion of April 9, 1974, the judge ruled that the jury instructions were so erroneous on what the jurors would have had to find to convict petitioner as to deny due process of law:

> What is lost in the approach of the charge is that it gave the jury no opportunity to decide that the killing was a grisly misadventure resulting from a senseless irruption of words in the middle of a drinking bout rather than a killing "in the heat of passion." The charge was pushed off center further by the necessity for charging the ideas of aiding, abetting and concerting; that gave to the whole of the charge a sort of background of calculated co-action alien to the nature of the drunken occasion and to the kind of fleeting and transient co-action that involved the brawling young men in responsibility for the death of Cross.
>
> Memorandum and Order, April 9, 1974, at 16-17.

He ruled moreover that the trial judge's charge on petitioner's failure to testify at trial unfairly highlighted petitioner's decision and thus violated petitioner's Fifth Amendment pri-

vilege against self-incrimination (Memorandum and Order, April 9, 1974, at 20).

Judge Dooling also ruled that the admission into evidence of co-defendant Leroy Sprinkler's statements implicating petitioner was not harmless error (Memorandum and Order, April 9, 1974, at 22).

ARGUMENT

Point I

PETITIONER HAS EXHAUSTED HIS STATE REMEDIES.

In its brief the State argues that Judge Dooling erroneously granted the writ because petitioner had not exhausted his state remedies. The State claims that petitioner improperly failed to seek leave to appeal to the Court of Appeals after the Appellate Division reaffirmed the judgment following petitioner's motion for re-argument to the Appellate Division made at Judge Dooling's suggestion (see Memorandum and Order, April 9, 1974, at 20, 22). However, under New York law the Court of Appeals has no jurisdiction to consider issues not preserved by objection at the trial. McKinney's New York Crim.Proc.Law §470.35 and practice commentary; People v. Friola, 11 N.Y.2d 147 (1962); Cohen and Karger, POWERS OF THE NEW YORK COURT OF APPEALS, §115, at 492 (1952). Since there was no objection at trial either to the instructions given to the jury or to the use of the confessions of the non-testifying co-defendant, Leroy Sprinkler,* the Court of Appeals could not consider these issues.

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*Bruton v. United States, 391 U.S. 123 (1968), although retroactive (Roberts v. Russell, 392 U.S. 243 (1968)), was not decided until nine years after the trial in this case. Defense counsel objected to Detective Burnes's testimony about Leroy Sprinkler's confession on grounds permitted in Delli Paoli v. United States, 352 U.S. 232 (1958). There was, of course, no objection premised on Bruton (196).

The State next argues there was no exhaustion because the Appellate Division lacked jurisdiction to consider the claims made in the petition for rehearing. However, under New York Crim.Proc.Law §470.50, the Appellate Division has jurisdiction to hear re-argument at any time. Further, the Appellate Division can consider issues not objected to below. McKinney's New York Crim.Proc.Law, §470.15(1). What is more, the Appellate Division explicitly stated that "this court has considered all the issues on this motion and the predicate appeal. We adhere to our position after reconsideration...."

Judge Dooling's opinion below states that the Appellate Division failed to consider and adjudicate the issues in accord with the Constitution (Memorandum and Order, August 15, 1974, at 1). The record here establishes that Judge Dooling could not have meant, as the State insists he did, that the Appellate Division did not consider the issues at all. The Appellate Division's order of July 2, 1974, makes clear that the constitutional issues were "considered" but rejected. Further, articulation of the constitutional issues by the state court is not required so long as those issues were presented to the state court for consideration. Picard v. Connor, 404 U.S. 270, 275 (1971).*

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*United States ex rel. Curtis v. Warden, 463 F.2d 84, 86 (2d Cir. 1972), does not hold to the contrary, as the State urges. In Curtis, the petitioner presented to the Federal courts in equal protection terms an argument he had earlier presented to the state courts in due process terms. The issue was whether the state court had considered the equal pro-

The State also argues that New York Crim.Proc.Law §440.10 is an existing available state remedy. That, however, is negated by the statute itself, which precludes use of collateral proceedings to raise an issue apparent on the face of the record. What is more, the remedy is unavailable where, as here, the issue has been previously raised in the Appellate Division.

Finally, the State's meritless claim of failure to exhaust is made in bad faith. In his opinion of July 9, Judge Dooling "solicited" both the District Attorney and the Attorney General to facilitate the matter to the state court for final adjudication. On petitioner's re-application for the writ presented to Judge Dooling, the State was aware of the procedural steps taken by petitioner without assistance of counsel in the Appellate Division.* Yet the State said nothing to Judge Dooling to advise him of its position with respect to New York law. Instead, the State waited until this appeal to raise the issue of exhaustion. The timing of the State's argument is an attempt to delay further a case which has been marked by extraordinary state court delay. The State cannot impermissibly use this non-jurisdictional doctrine of exhaustion to preclude the Federal courts from consideration of

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tection argument when it had not even been presented. Here, the argument was presented on the same theory in both state and Federal courts.

*In fact, petitioner without assistance of counsel did apply for relief under §440.10, but later withdrew it because he believed it was not the correct way to proceed. Record on Appeal, Document #22.

constitutional claims. United States ex rel. Graham v. Mancusi, 457 F.2d 463, 468 (2d Cir. 1972).

Point II

THE INTRODUCTION INTO EVIDENCE OF THE CO-DEFENDANT LEROY SPRINKLER'S STATEMENTS IMPLICATING PETITIONER WAS NOT HARMLESS ERROR.

The State could not prove that petitioner killed, stabbed, or came closer than ten feet to Cross during the affray. Thus, the State's theory of petitioner's guilt was either that petitioner aided and abetted others in a brawl which resulted in Cross's death, or that petitioner remained at the scene of the earlier incident, found Cross alive, and then stabbed him, thus causing Cross's death.

The aiding and abetting theory of petitioner's guilt was seriously undermined by the undisputed fact that petitioner and the others were havily intoxicated during the brawl and might have been unable to formulate the requisite intent to act in concert to commit the underlying crime which produced death.

The State had no direct evidence of guilt on the theory of the later stabbing. To prove its case against petitioner on this theory the State had no medical evidence. The coroner's testimony was that any one of eight of fourteen stab wounds received by Cross could have caused death. There

was no evidence as to who inflicted the fatal wound, which wound was fatal, or when the fatal wound was struck. Therefore, the State had to rely on Detective Reiter's testimony that petitioner led him to the knife on the day after the incident, two confessions of co-defendant Leroy Sprinkler, inadmissible under Bruton v. United States, supra, 391 U.S. 123, and hearsay coming from two witnesses virtually lacking in credibility, Fred Sprinkler and Thomas Abrams.

Two highly damaging statements of co-defendant Leroy Sprinkler implicating petitioner in the State's theory of the later stabbing were introduced by the State in violation of petitioner's Sixth Amendment right to cross-examination. Bruton v. United States, supra; Roberts v. Russell, supra, 392 U.S. 243. This evidence consisted of parts of two confessions -- one transcribed and one oral -- made by petitioner's co-defendant, Leroy Sprinkler, who did not testify at trial.

Detective Burnes testified to the oral confession. He stated that Leroy Sprinkler told him that Leroy overheard petitioner tell Abrams that "he [petitioner] did the guy over:"

> I asked him, "Did Joel Smith have anything to say about the stabbing?" He said, "Yes, Joel came along and told Abrams, while I was standing there, that my brother did a guy over, but he was not dead, and I did him over a couple of more times and he is dead now."
>
> I asked him who heard that. He said he was talking to Abrams, and Abrams heard it, and my brother heard it, and I heard it.
>
> (196).

The other statement, which was stenographically transcribed the day after the incident, was introduced to establish the very damaging conversation with petitioner related earlier by Fred Sprinkler and Abrams (i.e., that petitioner claimed to have remained at the scene and to have stabbed Cross twice) had indeed taken place. Although this second statement was ordered redacted by the trial judge, it was nonetheless read to the jury containing explicit incriminating statements about petitioner:

> Q What happened?
>
> A I told my brother, "Let's go up Ralph Avenue." We went to my cousin's house.
>
> Q Where did you do from there?
>
> A To Ralph Avenue and Pacific.
>
> Q When you were on Ralph Avenue, then did Joel Smith come up to you?
>
> A Yes.
>
> Q Who was with you on Ralph Avenue?
>
> A My brother and Thomas Abrams and a few more guys.
>
> [Redaction].
>
> Q What else did he [petitioner] say?
>
> A That's all I recall. I wasn't listening that close.
>
> Q You saw blood on his shirt?
>
> A Yes....
>
> (163).

This statement, when considered in light of Fred Sprinkler's and Thomas Abrams' earlier testimony, provided that testimony with critical corroboration.

The other two statements supporting the State's theory of the later stabbings were given by Fred Sprinkler and Thomas Abrams. Fred Sprinkler pleaded guilty to the indictment and admitted stabbing Cross four times, but was promised that in exchanged for his testimony he would be permitted to withdraw his plea and plead instead to manslaughter in the second degree, unarmed. He testified that shortly after the incident he met petitioner on a street corner and that petitioner claimed to have stabbed Cross twice after the other boys left the playground.

Thomas Abrams, Fred Sprinkler's friend, asserted he had overheard the conversation. Significantly, it was on the day before the trial, and presumably after Fred had received the promise of a reduced plea, that Abrams first told the authorities of this conversation. When he had earlier been interviewed by the police he did not reveal any of this "knowledge."

There can be no question, and indeed the State concedes, that Leroy's confessions were inadmissible under Bruton v. United States, supra, and Roberts v. Russell, supra. To argue from this record that the admission of the testimony concerning Leroy's confession was harmless error is simply incredible. Harrington v. California, 395 U.S. 250, 251 (1969);

Chapman v. California, 386 U.S. 18, 22 (1967). Leroy's confession must have had for the jury an aura of reliability about it that could not attach to either Fred Sprinkler's or Abrams' testimony. Fred Sprinkler had substantial reason for misrepresenting the truth; the circumstances of Abrams' testimony raise grave doubts as to his credibility. It cannot be said beyond a reasonable doubt that Leroy Sprinkler's confession played no part in the determinative process, that without it the jury would have concluded that petitioner was guilty, or that the evidence was otherwise overwhelming. Judge Dooling correctly found:

> ... It cannot be said that it is self-evident from the record that the apparent transgression of the Bruton principle would constitute harmless error within the Chapman-Harrington principle. ...
>
> Memorandum and Order, April 9, 1974, at 22.

Point III

THE CHARGE TO THE JURY WAS SO ERRONEOUS AND PREJUDICIAL AS TO DENY PETITIONER'S PRIVILEGE AGAINST SELF-INCRIMINATION.

A. On the facts of this case, the charge failed to provide the jurors with a method of factfinding to enable them to determine guilt.

Petitioner was charged with manslaughter in the first degree and assault in the second degree. The evidence was that he participated in the affray during which Fred Sprinkler and perhaps others, all of whom were extremely intoxicated, stabbed Cross, but did not then come closer than seven to ten feet from Cross, that he allegedly admitted having later stabbed Cross, and that he retrieved the knife on the day following the incident. The coroner related that it was impossible to determine which of eight possibly fatal wounds actually caused death or when Cross actually died.

Based upon these facts, the State offered two theories of petitioner's guilt: that petitioner aided and abetted in the original assault which inadvertently led to Cross's death; and that petitioner remained at the scene of the brawl after the others had left and later stabbed Cross. Despite the extremely complicated factfinding required by the jury by the facts and theories presented by this case,

the judge failed properly to inform the jurors of the elements necessary to establish guilt under the State's two theories. The failure to charge properly denied the jurors the guidance required for a valid factfinding process, and thus deprived petitioner of due process of law.* United States v. O'Dell, 462 F.2d 224 (6th Cir. 1972); United States v. Schmidt, 376 F.2d 751 (4th Cir. 1967); Wright, FEDERAL PRACTICE AND PROCEDURE, §487 (West 1969).

To prove guilt on the aiding and abetting theory, the State had to demonstrate that petitioner intended to participate and did participate in a scheme to assault Cross that inadvertently resulted in Cross's death. Since petitioner, along with the other boys, including Cross, was extremely intoxicated, there was a serious question of whether petitioner had the intent to inflict serious bodily harm on Cross or to act in concert with the others. No charge on intoxication, however, as required by former Penal Law §1220, was given by the judge.** Thus, as Judge Dooling observed, the jury was

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*The repetitive and contradictory charge must be read in its entirety to appreciate the judge's failure to provide guidance to the jury. The charge is A to the State's appendix.

**Intoxication as a defense is not available on a manslaughter in the first degree charge, intent not being an element of the crime. People v. Lee, 300 N.Y. 422 (1950). Here, however, petitioner was charged as an aider and abetter in an assault that lead inadvertently to a death. Since intent to participate in the scheme and intent to commit the assault are necessary elements of aiding and abetting assault (as the judge properly charged), then intoxication is available as a defense.

not properly instructed on how to apply the law to the complex facts of the aiding and abetting theory:

> What is lost in the approach of the charge is that it gave the jury no opportunity to decide that the killing was a grisly misadventure resulting from a senseless irruption of words in the middle of the drinking bout rather than a killing "in the heat of passion."
>
> Memorandum and Order, April 9, 1974, at 16-17.

The jury therefore was not told that should they find petitioner was too intoxicated to form the intent required for aiding and abetting and for assault, there was no theory under which petitioner could be convicted for his role in the original fracas.

As to guilt on the theory of later stabbing, the judge never instructed on this basis of guilt. The charge given by the judge on first degree manslaughter referred only to the original fracas -- one in which petitioner did not directly stab Cross.

Further, to prove guilt on the theory of later stabbing, the State had to prove that one of the wounds inflicted by petitioner caused death. The judge never instructed the jurors of this requirement. And, as indicated above, the State was unable to prove this by medical evidence. Judge Dooling properly recognized this error:

> ... The jury was not instructed as to what, if any, verdict and which, if either, count they

> could find against petitioner if not satisfied that he was an active participant in the first affray but were satisfied that he inflicted two later wounds and were not convinced that the wounds he inflicted were among the fatal wounds. From Fred Sprinkler's testimony the jury might have concluded that Fred Sprinkler's wounds in the abdomen had killed Cross and that the undescribed wounds inflicted by petitioner, if he inflicted any (for that depended on acceptance of the testimony respecting his alleged admissions) were not mortal and did not accelerate death.
>
> Memorandum and Order, April 9, 1974, at 12-13.

Nor was there any other proof of the fact that petitioner's actions caused death. The testimony of Fred Sprinkler and Abrams and the inadmissible confessions (see Point II, supra) of Leroy Sprinkler were not evidence of the effect of petitioner's actions. They reported only what petitioner told them, but petitioner himself was not capable of assessing the effects of his behavior. Further, the hearsay testimony, even if evidence of the effects of petitioner's actions, was highly impeachable and the jury, if properly charged, might well have found it insufficient to meet the State's burden of proof.

Also omitted from the judge's charge on manslaughter was an instruction, required by former Code of Criminal Procedure §§444, 445, that the jury could find petitioner guilty of second degree manslaughter if they were not satisfied that he acted "in the heat of passion," as required by the first degree manslaughter statute.

B. The judge's charge on petitioner's failure to testify violated petitioner's privilege against self-incrimination.

Also erroneous was the charge on the failure of petitioner to testify at trial:

> The defendants did not testify in this case. I charge you now that a person or persons accused of crime may or may not refuse to testify in their own behalf, and their failure to do so raises no presumption against them; in other words, the mere fact that the defendants did not testify, raises no unfavorable impression against them.
>
> The defendants have not taken the stand and you will consider then the case on the basis of the testimony you have heard.
>
> (305).

This charge violated New York law and the Fifth Amendment.

Former Code of Criminal Procedure §393 required a judge to charge the following:

> The defendant in all cases may testify as a witness in his own behalf, but his neglect or refusal to testify does not create any presumption against him.

Case law required this precise language to be used. People v. McLucas, 15 N.Y.2d 167, 171 (1965). But more importantly, the charge violated petitioner's privilege against self-incrimination by instructing that persons accused of crime "may or may not refuse to testify." As Judge Dooling noted, this charge was erroneous:

> ... To start with drawing attention to the absence of the defendant's testimony, then to approximate the idea of the statute in unhelpful and repetitious variation from its language, and to follow up with repeating that the defendants had not taken the stand and that the case would have therefore to be considered on the basis of the testimony of the witnesses that the jurors had heard went far to deny to petitioner the protection of the Fifth Amendment and of Section 393.
>
> Memorandum and Order, April 9, 1974, at 19.

Thus, in its entirety, the jury instructions were so erroneous as to deny petitioner due process of law. Cf. Cupp v. Naughten, 414 U.S. 141, 144 (1973).

CONCLUSION

For the foregoing reasons, the order of the District Court should be affirmed.

Respectfully submitted,

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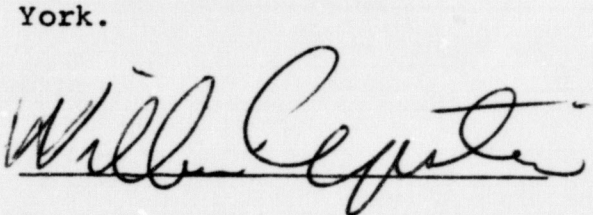

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